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12 SUPERIOR COURT OF STATE OF ARIZONA
13 COUNTY OF YAVAPAI

14 STATE OF ARIZONA,

15 Plaintiff,

16 vs.

17 JAMES ARTHUR RAY,

18 Defendant.

CASE NO. V1300CR201080049

Hon. Warren Darrow

DIVISION PTB

**DEFENDANT JAMES ARTHUR RAY'S
REQUEST FOR *WILLITS*
INSTRUCTION**

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20 Defendant James Arthur Ray, by and through undersigned counsel, hereby moves this Court
21 to instruct the jury pursuant to *State v. Willits*, 96 Ariz. 184 (Ariz. 1964), that, "If you find that the
22 State has lost, destroyed, or failed to preserve evidence whose contents or quality are important to
23 the issues in this case, then you should weigh the explanation, if any, given for the loss or
24 unavailability of the evidence. If you find that any such explanation is inadequate, then you may
25 draw an inference unfavorable to the State, which in itself may create a reasonable doubt as to the
26 defendant's guilt." REVISED ARIZONA JURY INSTRUCTIONS (CRIMINAL), Standard Criminal
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1 Instruction No. 10 (2010 Supplement to 3rd ed.). This motion is supported by the following
2 Memorandum of Points and Authorities.

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4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. INTRODUCTION**

6 The State has failed to preserve evidence critical to Mr. Ray's defense. As this Court well
7 knows, the State must prove causation beyond reasonable doubt, and the State has sought to carry
8 its burden through a theory that the three decedents died of heat stroke. One of Mr. Ray's core
9 defense theories targets the State's failure to prove that the cause of death was heat rather than a
10 superseding cause like toxic poisoning. Yet the State permitted to be destroyed or failed to
11 preserve important evidence—indeed, the best evidence—that Mr. Ray could use to contest the
12 State's theory and prove his innocence.

13 As recounted below, less than 2 days after the accident, the State released the crime scene
14 and expressly authorized Angel Valley Retreat Center to dismantle and burn the sweat lodge
15 structure and rake the grounds. The State also failed to test the decedents' blood samples for
16 evidence of organophosphate poisoning at a time when such testing would be meaningful. The
17 State did all of this despite the fact that in the hours following the accident, first responders and
18 law enforcement (including, according to his testimony, the case agent himself) believed that the
19 deaths were likely caused by toxicity.

20 These failures to preserve evidence have prejudiced Mr. Ray: Because the State
21 authorized the complete destruction of the alleged crime scene and over 99% of the sweat lodge
22 materials, collected only .0001 of the soil under the lodge, and deprived Mr. Ray of the ability to
23 test blood samples for relevant toxins, Mr. Ray cannot meet the State's accusations with
24 potentially exculpatory evidence. Compounding the prejudice, the State continually seeks to
25 assert, through detectives, doctors, and persons associated with Angel Valley, that there was no
26 affirmative evidence of pesticides at the scene. It is unfair and misleading to make such
27 representations, Arizona case law provides, when the State's own failure to preserve evidence
28 prevents Mr. Ray from defending against them.

1 Under these circumstances, to comply with the “fundamental fairness component of
2 Arizona Due Process,” Arizona law requires the trial court to give a *Willits* instruction, which
3 provides that the jury can infer the lost evidence would have been unfavorable to the State. *E.g.*,
4 *State v. Youngblood*, 173 Ariz. 502, 506–07 (1993). A *Willits* instruction is required here.

5 **II. STATEMENT OF FACTS**

6 The State destroyed or failed to preserve evidence important to this case. At a minimum,
7 the relevant, undisputed facts include the following:

- 8 • On October 8, 2009, the night of the accident, detectives and rescue personnel
9 suspected that toxicity had caused the three deaths. In the dining area, in front of
10 multiple police officers, a responder alerted participants that organophosphate
11 poisoning was suspected. *See* Exhibit 742. In addition, both first responders and
12 doctors placed phone calls to poison control.
- 13 • On October 9, 2009, Detective Diskin, the case agent, arrived at the scene. His
14 first thought was that toxins had likely been involved. In interviews on October 8
15 and 9, Ted and Debby Mercer told Detective Diskin that different wood had been
16 burned in 2009 compared to 2008. Mr. Mercer also told Detective Diskin on
17 October 9 that the tarps were stored in a pump house that contained chunks of rat
18 poison.
- 19 • On October 9, police officers took samples of the wood, the tarps, and soil. By
20 rough estimation, the samples constitute less than 1% of the tarps and less than one
21 thousandth of a percent of the soil.
- 22 • On October 9, police released the scene to Angel Valley, having been told that the
23 Hamiltons intended to conduct a ceremony that would involve destruction of the
24 sweat lodge and its constituent materials.
- 25 • On October 10, the Hamiltons conducted a “cleansing ceremony” at Angel Valley
26 in which they dismantled the sweat lodge, burned the materials, and raked the
27 grounds. The tarps were cut up and taken to the dump. The Hamiltons disposed of
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1 the remaining wood, including treated wood that had been noted by Detective
2 Diskin.

- 3 • During this time, doctors were treating the decedents and the critically ill
4 participants. Multiple doctors expressed concerns regarding toxins. The State did
5 not, however, request testing for organophosphates or pesticides, and did not
6 inform the medical examiners of the facts that, according to their testimony, would
7 have led them to test for those substances.

8 **III. ARGUMENT**

9 **A. Mr. Ray Is Entitled To A Willits Instruction Due To the State's Failure To**
10 **Preserve Potentially Exculpatory Evidence**

11 “The State has a duty to act in a timely manner to preserve evidence that is obviously
12 material and reasonably within its grasp.” *State v. Leslie*, 147 Ariz. 38, 47 (1985). “When items
13 are lost or destroyed a defendant is unable to determine whether they would have been helpful in
14 his defense.” *Id.* at 46–47. The Arizona Supreme Court “has used, as one method of overcoming
15 this problem and ensuring a fair trial, the *Willits* instruction.” *Id.* at 47. “A defendant is *entitled*
16 to a *Willits* instruction upon proof that (1) the state failed to preserve material evidence that was
17 accessible and might have tended to exonerate him and (2) there [is] resulting prejudice.” *Id.*
18 (emphasis added).¹ Mr. Ray’s case satisfies these requirements.

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23 ¹ As noted at the outset, the *Willits* instruction provides:

24 “If you find that the State has lost, destroyed, or failed to preserve evidence
25 whose contents or quality are important to the issues in this case, then you
26 should weigh the explanation, if any, given for the loss or unavailability of
27 the evidence. If you find that any such explanation is inadequate, then you
28 may draw an inference unfavorable to the State, which in itself may create a
reasonable doubt as to the defendant’s guilt.”

REVISED ARIZONA JURY INSTRUCTIONS (CRIMINAL), Standard Criminal Instruction No. 10 (2010
Supplement to 3d ed); *see also State v. Willits*, 96 Ariz. 184, 191 (Ariz. 1964).

1 1. **The State Failed To Preserve Evidence That Was Material And**
2 **Potentially Exonerating.**

3 The evidence the State failed to preserve—the sweat lodge, constituent materials, soil, and
4 blood samples—was *quintessentially* material and potentially exculpatory. A core defense
5 theory, supported by ample evidence adduced at trial, has been that a superseding cause such as
6 toxicity may have caused the three deaths. Testing of these lost materials could have supported
7 Mr. Ray’s theory and proven his innocence. In this way, Mr. Ray’s case lies in the heartland of
8 *Willits* cases. Indeed, the materiality of the evidence here—the sweat lodge itself—is much like
9 that in *Willits*, where the defendant was convicted of attempting to explode dynamite, defended
10 himself on the ground that the dynamite’s condition made explosion impossible, and was
11 impeded by the State’s failure to prevent military officials from destroying the dynamite. *See* 96
12 Ariz. at 188–89. Moreover, the evidence here is far more material than that in other cases where
13 a *Willits* instruction was required. *See, e.g., State v. Lang*, 176 Ariz. 475, 485 (1993) (*Willits*
14 instruction should have been given even though “the letter was not very important evidence”).
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16 In addition to being highly material, the evidence is potentially exonerating. This prong
17 does not require conclusive proof. “To be entitled to a *Willits* instruction . . . , an accused need not
18 prove that evidence destroyed by the State would have conclusively established a defense. An
19 accused need only show that ‘if the evidence had not been destroyed, it *might* have tended to
20 exonerate him.’” *State v. Hunter*, 136 Ariz. 45, 51 (1983) (emphasis added); *see also id.* at 50
21 (*Willits* instruction required because “[i]f the victim’s fingerprints had been found on the scissors
22 it would have tended to corroborate appellant’s claim that the victim attacked him with the
23 scissors.”) (emphasis added). Here, if the sweat lodge had not been destroyed, and had the soil,
24 of which only .0001 was collected, Mr. Ray or the State could have tested the materials to
25 determine whether they contained organophosphates or other toxins. Criminalist Dawn Sy
26 testified, for example, that testing the materials for organophosphates and other toxins would have
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1 been possible; that additional samples might have yielded different results from those the State
2 did preserve; and that preservation of the actual sweat lodge structure would have permitted
3 testing for compositions and quantities of substances that was otherwise not possible in this case.

4 Similarly, trial testimony supports the conclusion that testing of the decedents' blood
5 samples—at a time when organophosphates could still be detected—was material and potentially
6 exonerating. Trial testimony has indicated that organophosphates can be detected in blood; that
7 the testing must be done soon after the exposure; and that testing done in February 2011,
8 approximately 17 months after the accident, was too late to be reliable. "Because tests were not
9 made which could have been made, and because it cannot now be determined whether
10 exculpatory evidence would have been developed," Due Process is implicated and a *Willits*
11 instruction appropriate. *State v. Hannah*, 120 Ariz. 1, 2 (1978).

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14 **2. The Evidence Was Reasonably Accessible**

15 The sweat lodge structure and blood samples were easily accessible to the State. It is
16 undisputed that Detective Diskin and other officers expressly gave consent to the Angel Valley to
17 conduct its "cleansing ceremony," knowing that the ceremony would involve burning the sweat
18 lodge materials. Cases consistently hold that where, as here, the State has the opportunity to
19 prevent a third party from destroying evidence but fails to do so, the evidence was "accessible"
20 within the meaning of *Willits*. Thus, in *State v. Hunter*, 136 Ariz. 45 (Ariz. 1983), the Arizona
21 Supreme Court ruled that a *Willits* instruction was required when "detectives allowed a friend of
22 the victim to pick up and wipe off the pair of scissors found near the body before the scissors
23 could be analyzed for latent fingerprints." *Id.* at 50. *See also Perez*, 141 Ariz. at 463 (State
24 should have secured store videotape of robbery before it was destroyed, using either simple
25 request to store owner or, if necessary, a search warrant); *Willits*, 96 Ariz. at 187 (State failed to
26 stop U.S. Air Force officials from destroying dynamite).

1 So too were the blood samples accessible to the State. The samples were in the custody of
2 the medical examiners, who are State agents, or medical doctors who could have provided the
3 samples. And it is undisputed that the prosecution or law enforcement could have requested
4 testing at any time.

6 3. **The State's Failure to Preserve Evidence Has Prejudiced Mr. Ray.**

7 The prejudice prong of the *Willits* instruction essentially asks whether the defendant might
8 have benefitted at trial had the evidence been preserved. This not a question of prejudice-in-fact,
9 which would entitle a defendant to dismissal, but rather of potential prejudice. *See generally*
10 *State v. Serna*, 163 Ariz. 260, 264 (1990) ("We have held that a *Willits* instruction adequately
11 protects a defendant's due process rights where the state has destroyed or failed to preserve
12 evidence *unless the defendant is prejudiced* or the state acted in bad faith." (emphasis added)).
13 Here there can be little dispute that the evidence could have benefitted Mr. Ray's defense.
14 Testing of the sweat lodge materials and blood samples could have permitted Mr. Ray to prove
15 his innocence by showing that the decedents died of a superseding cause. The prejudice from the
16 destroyed sweat lodge is at least as great as the prejudice from scissors wiped clean in *Hunter*,
17 which justified a jury instruction permitting an inference against the State. *See Hunter*, 136 Ariz.
18 at 51 (instruction required when the missing evidence, if assumed to be unfavorable to the State's
19 case, could "have made the difference between the jury believing and disbelieving appellant's
20 version of the stabbing.").

23 Furthermore, the risk of prejudice is particularly great, and the need for a *Willits*
24 instruction enhanced, when the State's case relies on evidence that cannot be effectively rebutted
25 because of the State's failure to preserve evidence. "It is fundamentally unfair to allow the state
26 to introduce conclusions as to the contents of certain evidence against a defendant without
27 allowing him to inspect it in a manner that allows for meaningful rebuttal." *Leslie*, 147 Ariz. at
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1 47. In *Leslie*, the “fundamental unfairness” arose because the State relied on a police officer’s
2 testimony that a substance he observed in the victim’s car was blood, though the State did not
3 preserve the substance or have it analyzed. *Leslie*, 147 Ariz. at 45-46. *See also State v. Lang*,
4 176 Ariz. 475, 48 (Ariz. Ct. App. 1993) (acknowledging that destroyed saliva evidence on a
5 letter was not particularly significant, but concluding that *Willits* instruction should have been
6 given when prosecutor “used a blowup of [the letter] during his final argument, and he spent
7 considerable time and attention demonstrating how he had proved that the defendant actually
8 wrote the letter.”). In the case at hand, the State has relied on what it contends is an absence of
9 evidence of toxins, including by eliciting testimony from Michael and Amayra Hamilton that they
10 had an admittedly permeable “policy” against using pesticides on Angel Valley property.
11 Without access to the destroyed materials or now-unusable blood samples, Mr. Ray cannot
12 adequately meet these assertions. The State has, in essence, severely limited Mr. Ray’s avenues
13 for establishing that the decedents in the case were killed by toxins, while at the same time
14 arguing to the jury that no evidence of toxins exists. Mr. Ray has thus faced added prejudice
15 from the destruction of the scene of the alleged crime, and a *Willits* instruction is all the more
16 necessary.
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19 **IV. CONCLUSION**

20 The State failed to preserve material evidence within its grasp that might have exonerated
21 Mr. Ray, and this failure has prejudiced Mr. Ray by impeding his efforts to prove critical
22 elements of his defense. Accordingly, Mr. Ray is entitled to a *Willits* instruction.
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